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Mail Date
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Decision 01-11-034 November 8, 2001

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

City of Santa Cruz, a Municipal Corporation, Body Politic and Corporate, Complainant, vs. MHC Acquisition One, LLC (SWR 430), a Regulated Water and Sewer Corporation; MHC-DeAnza Financing Limited Partnership, a Limited Partnership; Starland Vistas, Inc., a Corporation; and Manufactured Home Communities, Inc., a Maryland Corporation, Defendants.	Case 00-09-059 (Filed September 28, 2000)

ORDER DENYING REHEARING OF DECISION 01-07-024

I. SUMMARY

In this decision, we deny the application for rehearing sought by the City of Santa Cruz (the City) of Decision (D.) 01-07-024 (Decision). In its complaint, the City sought revocation of MHC Acquisition One's (MHC) Certificate of Public Convenience and Necessity (CPCN) on the basis that the certificate interferes with the City's municipal powers. In the Decision, we found that the history of litigation between these parties reveals that the genesis of the dispute between them was the City's rent control ordinance and its applicability to MHC, and that the current manifestation of this dispute appears to be the terms and conditions on which the City will sell water and sewer

services to MHC for resale by MHC to its mobile home park tenants. We further found that the City had failed in any of its "Counts" to allege a violation of any statute or regulation of the Commission, specifically of Section 1702 of the Public Utilities Code. (Unless otherwise indicated, all statutory references are to the Public Utilities Code.) We therefore dismissed the complaint for failure to state a claim upon which relief could be granted. The application for rehearing fails to establish legal error and should therefore be denied.

II. DISCUSSION

The City argues that the Commission erred in failing to conduct an oral hearing on this matter because dismissals without a hearing are "disfavored," and can only be granted "…if there is no cognizable legal theory or if there are insufficient facts under a cognizable legal theory." (Application, page 2.) However, none of the authorities cited by the City support the argument that a hearing was required in this proceeding. Further, the factual and legal arguments offered by Applicant fail to comport with the requirements of Section 1702, which governs the allegations necessary to support a complaint. The section provides as follows:

> "Complaint may be made…setting forth any act or thing done or omitted to be done by any public utility, including any rule or charge heretofore established or fixed by or for any public utility, in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission…"

As we pointed out at length at pages 11 through 17 of the Decision, the City failed to make any factual or legal allegations in its complaint that MHC has violated any provision of law or any order or rule of the Commission pursuant to Section 1702. It was therefore not error to dismiss the complaint without an oral hearing pursuant to the Commission's Rules of Practice and Procedure, Article 2.5, section 6.1. None of the authorities cited by Applicant holds otherwise. In each of those cases, we found that there was a triable issue of fact and therefore declined to dismiss the complaints. In fact, we have consistently held that where, as here, a party fails to allege facts upon which relief may be granted, a motion to dismiss without hearing should be granted. (See Westcom v.

Pac. Bell, et al. (1994) 54 C.P.U.C. 244, 249, cited by Applicant; OII Re Mobile Tel. Services (1995) 59 C.P.U.C. 91, 95-96; Wood v. Public Utilities Commission (1971) 4 Cal.3d 288, 292,) Thus, the City's argument is without merit.

The City argues that the Commission erred by failing to respond to the City's central charge that MHC does not serve the public interest. However, as we stated in the Decision, the time is long past for the City to make this argument. In D.98-12-077, we granted a CPCN to MHC to operate the water utility that is the subject of this complaint and application for rehearing. As we pointed out at page 15 of the Decision, all issues relating to the issuance of the CPCN could and should have been raised in an application for rehearing of D.98-12-077 pursuant to Section 1731. The time for that rehearing expired and the issues cannot be raised at this time in a complaint proceeding pursuant to Section 1702. We will not allow parties to circumvent the requirements of Section 1731 by filing a complaint, and, when that is dismissed, raising legal argument in an application for rehearing that should have been raised several years ago.[1]

The City next alleges that we erred in holding that MHC is sanctioned to interfere with the City's chartered authority to provide utility services. In fact, the Decision only holds that the City has failed to allege any violation of state law or Commission regulation constituting a violation of Section 1402 and that the complaint should be dismissed. There is no "sanction" of interference with the City's authority to operate a municipal water service. If the City wishes to provide water service in MHC'S service territory, it can do so anytime it wishes by condemning the utility, paying for it and operating the service itself pursuant to Government Code, section 37350.5. As we pointed out in the Decision, at page 11, the basis of Applicant's argument appears to be that the City has the sole authority to make and enforce all laws relating to municipal

[1] We note that, in support of its allegations, Applicant quotes at length from the testimony of our Water Branch submitted at the hearing on MHC's original application for a CPCN. This is a perfect example of the reason for requiring such argument to be made in a timely application for rehearing. It has now been over three years since the Commission considered this testimony, and Applicant would now have us review it again in an unrelated complaint procedure.

affairs, and that the Commission cannot regulate, supervise, or otherwise interfere with a municipal utility. We do not disagree. The problem is that MHC is not a municipal utility. It is an investor-owned public utility subject to the jurisdiction of this Commission pursuant to the California Constitution, Article XII, Section 6 and Sections 454 and 1001 of the Public Utilities Code. All of the many cases cited by Applicant involve interference with a municipal utility, not a privately owned one. In D.98-12-077, we exercised our jurisdiction and granted MHC a CPCN and approved its rates. Since the California Constitution and the Public Utilities Code vest exclusive authority for such acts in this Commission, the City may not alter this decision. (Decision, pages 11-12.)

The City next alleges that the Decision was in error because it dismissed the complaint for failure to comply with the provisions of Section 1702. Applicant makes the novel argument that we are "obliged to hear complaints against public utilities, even when the allegations fall short of actual violations." (Application, page 19.) While Applicant is correct that the Commission does have some discretion in deciding whether to entertain a complaint, we are nonetheless constrained by the language of Section 1702. There must be some plausible allegation of a violation of law or Commission Regulation. Further, Applicant has failed to cite a single statute or case that holds that the failure to exercise that discretion constitutes legal error. Finally, the purportedly unlawful action complained of--MHC's alleged interference with the activities of a municipal utility--we have specifically found to be not a violation within the purview of Section 1702. The City has failed to allege any violation of law or Commission rules or regulations and the argument that is the Commission was obliged to hear the complaint is without merit.

The City next argues that the Decision is in error because it states that MHC was not required to obtain resale approval from the City. (Application, page 22.) Applicant quotes from D.98-12-077, page 31, for the proposition that such resale authority was indeed contemplated by the Commission. However, a reading of the language in that decision does not reveal any requirement for a resale license from the City. In fact, the word "resale" does not appear. Rather, the decision only contemplates

that, since MHC has no independent supply of water, it will have to purchase it from the City, subject to its "reasonable supplier rules."

Next, Applicant argues that the decision is in error "By failing to acknowledge and correct MHC's true position regarding its CPCN: that it need nothing but CPUC certification to compel the City to allow resale of its water and sewer services, the decision fails to fulfill the CPUC's duty to regulate and supervise its public utilities." (Application, page 25.) In support of this allegation, the City then quotes extensively from a complaint filed by MHC against the City in Superior Court, Santa Cruz County in MHC, Inc., v. City of Santa Cruz, Superior Court No. CV 140682. The substance of the complaint in Superior Court, which is for administrative mandamus, is MHC's allegation that the refusal of the City to sell water to MHC is in violation of the rules and regulations and jurisdiction of this Commission pursuant to the Public Utilities Code, and that the City is therefore required to sell water to the utility.

We are puzzled by exactly what Applicant would have this Commission do in response to this lawsuit and how our alleged inaction constitutes legal error in our Decision in this matter. As we pointed out at page 17 of the Decision, where we declined to go any further than to conclude that we could set rates for MHC, the question of the supply of water to MHC by the City is presently pending in both state and federal courts, and is not, in any event, an issue that can properly be placed before this Commission in a complaint proceeding pursuant to Section 1702. Further, this Commission does not have the authority to order the City of Santa Cruz to sell its water to MHC, as Applicant would surely agree.

Finally, Applicant argues that we erred in failing to revoke the CPCN granted in D.98-12-077 because that decision erroneously granted authority to MHC to operate a sewer system. The City alleges that this Commission has no jurisdiction over the operation of a sewer system in a mobile home park where the park and water system are owned by a single owner, citing D.01-05-058, issued in I.98-12-012. Applicant is once again posing arguments that should have properly been brought in a timely application for rehearing of D.98-12-077 but were not. We reiterate that a complaint

brought under Section 1702 is not the proper proceeding to complain that the original decision granting a CPCN was in error. D.98-12-077 is now final and pursuant to Section 1709, cannot be collaterally attacked.

Further, the argument itself is without merit. As we stated in D.98-12-077, at page 9, "speaking of MHC, it will own and operate the systems as water and sewer systems. These corporations would be separate from the Park entity which is under rent control." (Emphasis added.) The Decision is not in conflict with D.01-05-058, nor with Section 230.5. The joint ownership of water, sewer, and mobile park prescribed by D. 01-05-098 is not present here. The argument is without merit.

III. CONCLUSION

Applicants have failed to establish any factual or legal errors in D.01-07-024. The application for rehearing should therefore be denied.

IT IS ORDERED that:

1. Rehearing of D.01-07-024 is denied.
2. This proceeding is closed.

This order is effective today.

Dated November 8, 2001, at San Francisco, California.

LORETTA M. LYNCH
President
RICHARD A. BILAS
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners

Commissioner Henry M. Duque, being necessarily absent, did not participate.